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In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD R. WHEELER,
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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20 pp

QUESTION PRESENTED

WHETHER the military interrogator's custodial manipulation of a mentally impaired individual's strong religious beliefs rendered his resulting self-incriminatory statements involuntary.

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In the Supreme Court of the United States

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RICHARD R. WHEELER,
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v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Richard R. Wheeler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 22 M.J. 76 (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is reported at 18 M.J. 823 (A.C.M.R. 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 28, 1986, affirming petitioner's conviction dated December 13, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Uniform Code of Military Justice provides:

Article 31, 10 U.S.C. § 831 (1982):

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> . . . .
>
> (d) No statement obtained from any person in violation of this article, or through use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Military Rule of Evidence 304(e) provides:

> (e) *Burden of Proof.* When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. . . .
>
> (1) *In general.* The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence.

STATEMENT OF THE CASE

Petitioner was charged with raping Teri Collins on August 8, 1983, once in the vicinity of Tacoma, Washington and again on Fort Lewis, Washington. He was also accused of raping Grace Ngirmeker in Tacoma and of raping and sodomizing her on Fort Lewis, on September 9, 1983. On September 15, 1983, Ms. Ngirmeker identified petitioner in a photographic line-up conducted by Detective Correll of the Tacoma Police Department (R. 129-31). Based on this information, Army Criminal Investigation Command (CID) agents apprehended petitioner later that day (R. 106).

Correll and CID Special Agent (SA) Herring together interrogated petitioner for an hour at Herring's Office on Fort

Lewis (R. 25, 30-31, 108).[1] Throughout the hour of joint interrogation (R. 25, 30-31), petitioner denied any involvement (R. 29, 107). Correll then left petitioner alone with his military interrogator (R. 31, 108). Petitioner soon mentioned that he had been praying to God about an unspecified "problem" (R. 31, 123). Special Agent Herring responded that he and God knew of petitioner's problem (R. 31). As petitioner began to weep, Herring invited him to pray to God for strength to "go ahead and get this off [his] chest . . ." (R. 32, 124). Special Agent Herring then knelt before petitioner, who joined him on the floor (R. 124). Petitioner, on his knees and weeping, turned his eyes upward and said, "I didn't mean to do it. I didn't mean to attack those women, God, I need help and strength." (R. 32, 124). After a moment, petitioner and SA Herring retook their seats and petitioner gave a full account of the Ngirmeker offenses (R. 32-33a, 124-25, Prosecution Exhibits 3 and 4).

According to his psychiatrist, Dr. (Major) Schilt, petitioner suffered from a schizotypal personality disorder (R. 255). Petitioner was somewhat paranoid; he believed in magical thinking and that a former girlfriend controlled him through a curse (R. 257). At trial, petitioner rambled disjointedly (R. 275-81).

Pursuant to defense motion, the offenses which transpired in Tacoma were dismissed for lack of jurisdiction (R. 38-39). A defense motion *in limine* to exclude the petitioner's statements as involuntary was denied (R. 40). Contrary to his pleas, petitioner was convicted of the forcible sodomy of Grace Ngirmeker and the rapes of Ms. Ngirmeker and Ms. Collins and sentenced to a dishonorable discharge, confinement at hard labor for life, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The

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[1] Before questioning, each officer advised petitioner of his rights under the fifth amendment and Miranda v. Arizona, 384 U.S. 436 (1966). SA Herring additionally informed petitioner of his rights under Article 31, Uniform Code of Military Justice, 10 U.S.C. § 831 (1982); each secured a printed rights waiver (R. 24-29; 107-08; Prosecution Exhibits 1 and 2). Petitioner, however, did not recall being informed that he could terminate the questioning and believed that he could not (R. 21).

lower appellate courts have considered the issues presented in this petition. As a prerequisite to the Court's jurisdiction, the Court of Military Appeals granted on the following issue:

> WHETHER THE APPELLANT'S STATEMENT WAS THE PRODUCT OF PSYCHOLOGICAL COERCION AND THEREFORE INVOLUNTARY.

REASONS FOR GRANTING THE WRIT

In order for an accused's statements given to the police during interrogation to be used against him, the government must prove by a preponderance of the evidence that those statements were made voluntarily, after proper advice as to the right to counsel and the right to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Lego v. Twomey*, 404 U.S. 477 (1972); Military Rule of Evidence 304. The military judge erroneously determined that the government met this burden despite the uncontested evidence that petitioner's statements directly resulted from the military interrogator's custodial manipulation of a weak-minded individual's strong religious beliefs. In affirming the military judge's determination, the Court of Military Appeals misapplied the Court's decisions in *Davis v. North Carolina*, 384 U.S. 737 (1966) and *Brewer v. Williams*, 430 U.S. 387 (1977) by failing to give proper weight to the military interrogator's use of religious inducements when considering the totality of the circumstances surrounding petitioner's statements.

I. PETITIONER'S STATEMENTS WERE INVOLUNTARY

At trial it was uncontested that petitioner suffered from a schizotypal personality disorder (R. 255) and that he sought refuge from the pain of his disastrous family and social life and the guilt of his actions in a search for Jesus (R. 275-81). "I've been praying everyday. Ask Jesus to come into my heart. Come into my heart, please. But, I get up, and I still feel the same." (R. 281). His military interrogator exploited this unusually intense spiritual yearning by holding open the possibility of spiritual redemption if petitioner would confess.

The Court has long held that an invalid confession need not be the result of physical torture or otherwise abusive police techniques. It is the "totality of the circumstances" which must be examined to determine whether the confession is the product of an affirmative choice by the accused. *Fikes v. Alabama*, 352 U.S. 191, 197, *reh. den.*, 352 U.S. 1019 (1957). *Accord, Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). Fundamental fairness precludes a conviction predicated on a confession obtained through the custodial manipulation of a mentally impaired individual's strong religious beliefs.

A voluntary confession is "the product of a rational intellect and a free will." *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). Psychological pressures or physical intimidation, conversely, lead to coerced to self-incrimination. *Townsend v. Sain*, 372 U.S. 293, 307 (1963). Despite an early emphasis on threatened or actual physical abuse[2] and the resultant confession's dubious reliability, the focus has shifted to a consideration of psychological coercion and its due process ramifications. *Rogers v. Richmond*, 365 U.S. at 541.[3] An accused's idiosyncratic weaknesses may not be exploited to overbear his will. *Blackburn v. Alabama*, 361 U.S. at 207-08.

Each inquiry into the totality of circumstances where psychological coercion is at issue must focus closely on the individual's potential to resist and to exercise his free will. "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." *Stein v. New York*, 346 U.S. 156, 185 (1953).

Petitioner is "of low mentality if not mentally ill," *Fikes v. Alabama*, 352 U.S. at 196; he suffers from a mental disorder

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[2] *See e.g.* Payne v. Arkansas, 356 U.S. 560 (1958) (threats); Reck v. Pate, 367 U.S. 433 (1961) (physical deprivations).

[3] *See e.g.* Davis v. North Carolina, 384 U.S. at 752 (16 days of intermittent custodial interrogation; religious appeal); Lynumn v. Illinois, 372 U.S. 528, 534 (1962) (threatened termination of parental rights and state aid to children).

(R. 255) and his General Technical test[4] score is only 85 (Prosecution Exhibit 52). He was subjected to inherently coercive custodial interrogation by two police officers, *see Miranda v. Arizona*, 384 U.S. at 455-58, a coercion enhanced by the fact that petitioner is a soldier, subject to the well-recognized, albeit "subtle," pressures of military society. *See United States v. Remai*, 19 M.J. 229, 233 (C.M.A 1985); *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981). Finally, petitioner was subjected to religious appeals which ultimately overbore his weak will. The extraordinary power of such an interrogation technique has led at least one court to ban its use. *People v. Adams*, 143 Cal.App.3d 970, 192 Cal.Rptr. 290 (1983). The Court has also recognized the efficacy that spiritual entreaties may have, without holding that such stratagems are *per se* coercive. *Davis v. North Carolina*, 384 U.S. at 751; *Brewer v. Williams*, 430 U.S. 387, 412 (1977) (Powell, J., concurring). *See Martin v. Wainwright*, 770 F.2d 918, 925 (11th Cir. 1985); *Gessner v. United States*, 354 F.2d 726 (10th Cir. 1965).

Thus, the totality of the circumstances in this case, *i.e.*, petitioner's mental disorder, his religious attitude, his military training to obedience of authority, and the inherent coercion of custodial interrogation, finally exacerbated by the interrogator's use of the petitioner's religious beliefs, rendered the statements involuntary.

II. PETITIONER WAS PREJUDICED BY THE DECISION OF THE COURT BELOW

Since the government relied on the petitioner's statements to corroborate the victims' testimony and prove its case, a rehearing is required. There is no possibility that the statement and detailed confession were unimportant to the members in determining guilt. *Bumper v. North Carolina*, 391 U.S. 543 (1968). The error in admitting petitioner's oral

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[4] The "GT" score is a rough measure of intelligence. *See e.g.* United States v. Griffin, 15 C.M.A. 135, 35 C.M.R. 107, 111-12 (1964); United States v. Molinary-Rivera, 13 M.J. 975, 976 (A.C.M.R. 1982).

and written admissions was not harmless since " 'there is a reasonable possibility that [the coerced statements] might have contributed to the conviction.' " *Chapman v. California*, 386 U.S. 18, 23 (1967), *quoting Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). Coerced confessions violate "constitutional rights [which] are so basic to a fair trial that their infraction can never be treated as harmless error. . . ." *Chapman v. California*, 386 U.S. at 23 (footnote omitted). Petitioner's involuntary confession was so detailed and in such conflict with his testimony at trial that it is inconceivable that it did not contribute to the conviction. Due process demands reversal and a rehearing.

CONCLUSION

For the foregoing reasons, including the importance of the constitutional issue involved, and the fact that the Court of Military Appeals decided the instant case in a manner which conflicts with the applicable decisions of the Court, the petition for certiorari should be granted. The question presented is substantial and of crucial public significance.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 50840.
CM 443811

UNITED STATES, APPELLEE

v.

RICHARD R. WHEELER,
PRIVATE FIRST CLASS, U.S. ARMY, APPELLANT

April 28, 1986

For Appellant: *Colonel Brooks B. La Grua* (argued); *Colonel William G. Eckhardt, Lieutenant Colonel William P. Heaston, Captain Donna Chapin Maizel* (on brief); *Major Edwin D. Selby* and *Captain David L. Carrier.*

For Appellee: *Major Larry D. Williams* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Joseph A. Rehyansky* (on brief).

Amicus Curiae On Behalf of Appellant: Michael Kaye, Esq. (on brief); *Paul Oller,* Legal Intern-For the Washburn Law Clinic, Washburn University School of Law.

Opinion of the Court

EVERETT, Chief Judge:

Appellant was tried by a general court-martial at Fort Lewis, Washington, on December 13, 1982. Contrary to his pleas, the members of this court-martial found appellant guilty of two specifications of rape[1] and one specification of forcible sodomy, in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925, respectively. The sentence adjudged was dishonorable discharge,

[1] Another specification alleging rape was dismissed by the military judge for lack of subject-matter jurisdiction. *Cf. O'Callahan v. Parker,* 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969).

confinement for life, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved this sentence; and the Court of Military Review affirmed. 18 M.J. 823 (1984).

The Court granted review on the following issue of law:

> WHETHER THE APPELLANT'S STATEMENT WAS THE PRODUCT OF PSYCHOLOGICAL COERCION AND THEREFORE INVOLUNTARY.

We hold that appellant's pretrial statements[2] were voluntary and therefore admissible against him at this court-martial. *See* Art. 31(d), UCMJ, 10 U.S.C. § 831(d); *United States v. Murphy*, 18 M.J. 220, 235 (C.M.A.1984) (Everett, C.J., and Fletcher, J., concurring in the result.)

The relevant facts, as summarized by the Court of Military Review, are these:

> On 15 September 1982, after having been identifed as the principal suspect in the second incident, appellant was taken into custody for questioning by military and civilian criminal investigators. Before interrogating him, both investigators advised appellant of his rights to remain silent and to obtain counsel, which appellant waived. Initially denying that he committed the offenses against Miss N., appellant eventually admitted to Special Agent Herring of the Fort Lewis Criminal Investigation Division that he was the perpetrator.
>
> Special Agent Herring testified that he did not unlawfully coerce appellant into confession, but that:
>
> > I basically appealed to his conscience, and told him that I didn't believe his stories that he'd been giving us up until then and he, at first, denied any involvement and then he said that he'd been praying to God alot about his problem, and that was the first kind of admission that he gave to me at all.

---

[2] A typed pretrial statement contained a confession to the rape alleged in the specification dismissed for lack of jurisdiction. *See* n. 1, *supra*. In addition, Wheeler made various oral admissions relevant to the offenses of which he was convicted.

> Q. What did he say?
> A. He said that–his exact words were, "I've been praying to God a lot about my problem," without saying what the problem was. I understood it to be his crime. And, at that point I said, "Yes, I know that you have a problem, and you know that you have a problem and God knows that you have a problem." Tears welded [sic] in his eyes, and he continued saying things to the effect that he'd been praying a lot about it, and I said, "Would you be willing to pray to God right now to give you the strength to go ahead and get this off your chest and start living your life and turning your life around?" I got down on my knees with him and he was crying there, and he turned his head upward and said, "*I didn't mean to do it. I didn't mean to attack those women,* God, I need help and strength." And that lasted 30 seconds or so. We got back in our chairs and he drew his strength back up again and stopped crying, and looked at me and said, *"You're right. What you said was true. I did do it."*

18 M.J. at 824 (emphasis added).

At trial appellant moved to suppress his pretrial statements because they were induced by a CID agent's promise of help from a psychiatrist and because he had not been made aware that he could terminate the interview at any time. However, Special Agent Dale Herring, who conducted the interview, testified that no promise of psychiatric assistance was made to appellant and that he had responded to appellant's *post-confession* inquiry for psychiatric assistance by advising him to contact his unit or stockade personnel. Herring further testified that Wheeler had been fully advised of his legal rights, including the right to terminate the interview at any time, and had indicated that he understood these rights. The military judge found against appellant on this issue as a matter of fact; and we perceive no reason to overturn the ruling. *See United States v. Schneider*, 14 M.J. 189, 195 (C.M.A.1982). *See also Castleberry v. Alford*, 666 F.2d 1338, 1342, 1343 (10th Cir.1981).

Before the Court of Military Review, appellate defense counsel expanded the objection that appellant's statement had been improperly induced. He argued that Agent Herring's appeal to appellant's religious beliefs was psychologically coercive in view of his youth, limited intelligence, mental disorder (schizotypal personality) and his "Judeo-Christian" belief in "the cleansing power of confession." Accordingly, he concluded that a confession extracted in this manner under these circumstances was involuntary. *See Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); *Gessner v. United States*, 354 F.2d 726 (10th Cir. 1965). *See also Brewer v. Williams* 430 U.S. 387, 412, 97 S.Ct. 1232, 1246, 51 L.Ed.2d 424 (1977) (Powell, J., concurring).

Before this Court, appellant again contends that the totality of circumstances dictates the conclusion that his confession was involuntary. In its brief, amicus curiae also suggests that this Court establish a "bright line" rule forbidding invocation of an accused's religious beliefs by government agents in attempting to secure a confession. *See People v. Adams*, 143 Cal.App.3d 970, 192 Cal.Rptr. 290 (1983). However, we are not inclined to hold that an appeal to one's religious convictions is so inherently coercive that subsequently-obtained confessions are *per se* involuntary. *Cf. Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). If this were true, the Supreme Court in *Davis v. North Carolina* and *Brewer v. Williams*, both *supra*, and the Court of Appeals in *Gessner v. United States supra*, could have decided those cases without reference to other circumstances involved. Although we recognize that such an appeal can combine with other circumstances to produce an involuntary confession, *id.*, our examination of the record (*see Davis v. North Carolina, supra*, 384 U.S. at 741-42, 86 S.Ct. at 1764), leads us to agree with the military judge[3] and the Court of Military Review that appellant's confession was voluntary.

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[3] Under the Military Rules of Evidence in effect at the time of appellant's trial, the members no longer determined the admissibility of a confession. Mil.R.Evid. 304(e)(2); *see also* Drafters' Analysis, App. 22, Manual for Courts-Martial, United States, 1984; S. Saltzburg, L. Schinasi, D. Schlueter, *Military Rules of Evidence Manual* 80-81 (1981).

In reaching this conclusion, we first note that appellant testified that his confession was induced by the CID agent's promise of the assistance of a psychiatrist. Although this testimony was rejected by the trial judge as a matter of fact, Wheeler's failure even to mention Herring's religious appeal indicates that it could have had only minor impact, *Cf. Barrera v. State,* 99 Wis.2d 269, 298 N.W.2d 820, 830 (Wis.1980). Second, appellant voluntary waived his Article 31 rights and consented to answer the CID agent's questions before the topic of religion had been mentioned. *Cf.* III Wigmore, *Evidence* § 840 (Chadbourn rev. 1979). This conduct, coupled with his later statements, is consistent with a self-induced decision to speak. Third, it was Wheeler, not the investigator, who injected the topic of religion into the interrogation process. While this fact does not rule out the possibility of psychological coercion, it reduced the likelihood that the interrogator was using a religious appeal as a means to destroy Wheeler's freedom of will. Fourth, Herring's appeal to appellant's religious beliefs – which were not detailed on the record – was general in nature and amounted to no more than an appeal to his conscience. As pointed out by Justice Frankfurter in *Culombe v. Connecticut,* 367 U.S. 568, 576, 81 S.Ct. 1860, 1864, 6 L.Ed.2d 1037 (1961), "The police may be midwife to a declaration naturally born of remorse, or relief, or calculation." Finally, the interrogation lasted for but one hour (*cf. Davis v. North Carolina, supra*); appellant was fully advised of his rights by both a civilian investigator and a military investigator (*cf. Gessner v. United States, supra*); and his age of 22 and high school education suggest no defect in maturity or intelligence. *Cf. Culombe v. Connecticut, supra.*[4]

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[4] We have considered the testimony of the psychiatrist offered by the defense during the sentencing portion of appellant's court-martial. This testimony was not directed towards his capacity to give a voluntary confession or whether he did so in this case. In any event his psychiatric condition – neither by itself nor with other factors in this case – rendered his confession involuntary. *Cf. Blackburn v. Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).

In summary, the religious beliefs of appellant may have motivated him to make his confession. *See* O. Rogge, *Why Men Confess* 210-12 (Thomas Nelson & Sons, New York, 1959). However, a confession so motivated is neither unreliable (*see* Wigmore, *supra,* § 840) nor involuntary. *See generally Oregon v. Elstad,* ___ U.S. ___, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985). Moreover, no authority has been presented to this Court which convinces us that a person with religious beliefs is *per se* incapable of making a voluntary confession. *See Barrerra v. State, supra* 298 N.W.2d at 831[5]. Where the appeal to religious beliefs amounts to "no more persuasion to the defendant than the usual adjuration . . . to speak the truth," no improper inducement occurs. *Smith v. State,* 248 Ala. 363, 27 So.2d 495, 497 (1946). While there is the possibility that a religious appeal by itself or in conjunction with other circumstances might cross the line of intimidation (*see* Wigmore, *supra,*) we conclude this was not true in appellant's case.

The decision of the United States Army Court of Military Review is affirmed.

Judge COX concurs.

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[4] To whatever extent *People v. Adams,* 143 Cal.App.3d 970, 192 Cal.Rptr. 290 (1983), suggests the contrary, we disagree with that precedent.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

CM 443811

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS RICHARD R. WHEELER,
SSN 291-62-3061, UNITED STATES ARMY, APPELLANT

---

20 Aug. 1984

Captain Donna Chapin Maizel, JAGC, argued the cause for the appellant. With her on the brief were Lieutenant Colonel William P. Heaston, JAGC, and Major Edwin D. Selby, JAGC.

Captain Debbie J. O'Bryan, JAGC, argued the cause for the appellee. With her on the brief were Colonel James Kucera, JAGC, Captain Thomas E. Booth, JAGC, and Major David E. Wilson, JAGC, USAR.

Before McKAY, PAULEY and WERNER, Appellate Military Judges.

OPINION OF THE COURT

WERNER, Judge:

Contrary to his pleas, appellant was convicted by a court-martial with members of raping a woman in August 1982 and of raping and sodomizing another woman one month later in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. The approved sentence provides for a dishonorable discharge, confinement at hard labor for life, total forfeitures and reduction to Private E-1.

Among the errors assigned by appellant are: that his conviction was based upon an involuntary confession unlawfully obtained through psychological coercion; that the military

judge erred by improperly instructing the court members concerning the appellant's eligibility for parole; and that his counsel was ineffective. We find each of these contentions to be without merit.

I. VOLUNTARINESS OF THE CONFESSION

At 2230 hours, 7 August 1982, appellant abducted Miss Terri C. in her car while she was stopped for a traffic light on a street in Tacoma, Washington. For the next four hours, during which he drove around Tacoma and on Fort Lewis, Washington, appellant threatened and berated Miss C., forced her to undress and lie on the floor of the vehicle, locked her in the trunk of her car and twice raped her.

At 0300 hours, 9 September 1982, the appellant employed a similar *modus operandi* to abduct, rape and sodomize Miss Grace N. This incident lasted for about two and one-half hours and also occurred in Tacoma and on Fort Lewis. On 15 September 1982, after having been identifed as the principal suspect in the second incident, appellant was taken into custody for questioning by military and civilian criminal investigators. Before interrogating him, both investigators advised appellant of his rights to remain silent and to obtain counsel, which appellant waived. Initially denying that he committed the offenses against Miss N., appellant eventually admitted to Special Agent Herring of the Fort Lewis Criminal Investigation Division that he was the perpetrator.

Special Agent Herring testified that he did not unlawfully coerce appellant into confession, but that:

> I basically appealed to his conscience, and told him that I didn't believe his stories that he'd been giving us up until then and he, at first, denied any involvement and then he said that he'd been praying to God alot about his problem, and that was the first kind of admission that he gave to me at all.
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> Q. What did he say?
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> A. He said that – his exact words were, "I've been praying to God a lot about my problem," without saying what the problem was. I understood it to be his crime. And, at

> that point I said, "Yes, I know that you have a problem, and you know that you have a problem and God knows that you have a problem." Tears welded [sic] in his eyes, and he continued saying things to the effect that he'd been praying a lot about it, and I said, "Would you be willing to pray to God right now to give you the strength to go ahead and get this off your chest and start living your life and turning your life around?" I got down on my knees with him and he was crying there, and he turned his head upward and said, "I didn't mean to do it. I didn't mean to attack those women, God, I need help and strength." And that lasted 30 seconds or so. We got back in our chairs and he drew his strength back up again and stopped crying, and looked at me and said, "You're right. What you said was true. I did do it."

Appellant, on the other hand, characterizes Agent Herring's interrogation technique as psychological coercion. Appellant argues that his confession was involuntary since Herring only obtained it after inducing him to seek divine forgiveness, thereby capitalizing on his religious beliefs. *See* Military Rule of Evidence 304(c)(3). We disagree. In the first place, the discussion of religion was initiated by the appellant – not Agent Herring. Furthermore, an examination of the context in which the discussion occurred supports the conclusion that appellant was attempting to unburden himself of guilt, and was not bowing under the pressure of police interrogation. Under the circumstances, we are convinced, as was the trial judge who had the opportunity to observe the interrogator's demeanor while testifying, that appellant was not unlawfully coerced into confession. *See United States v. Schneider*, 14 M.J. 189, 195 (C.M.A.1982); *United States v. Schuring*, 16 M.J. 664, 669 (A.C.M.R.1983).

II. INSTRUCTIONS CONCERNING PAROLE ELIGIBILITY

Appellant contends that the military judge erred when, in response to a court member's question concerning elibility for parole, he stated:

> All right. First of all, parole is available to an accused who is serving confinement, including life imprisonment. And it varies upon the length of the sentence. Of course,

that's only for those eligible for consideration of parole. It also depends upon the conduct of the accused, so, I can't, and I won't give you a direct answer. I'm not going to tell that parole is available in x period of time. Because I can't tell you what the conduct of the accused is going to be. Parole is available to an accused sentenced by a military court including life imprisonment. You should determine, in terms of confinement, what you feel is appropriate for this accused. Under these circumstances, don't be concerned about the impact of parole. Just realize that it is available, in every single case, including a sentence to life. When selecting an appropriate sentence, you should select a sentence which will best serve the end of good order and discipline, the needs of the accused, and the welfare of society. I really don't think I can give you any more of a specific answer, Colonel A.. Any objections to the instructions I've just given?

Essentially, appellant's argument is that the military judge's instruction violated the holding of the Court of Military Appeals in *United States v. Ellis*, 15 U.S.C.M.A. 8, 34 C.M.R. 454 (1964). We disagree. In *Ellis* a law officer's presentencing instructions were condemned because they adjured the court members to take into account possible mitigating action by convening and other appellate authorities in arriving at an appropriate sentence. Besides tending to result in harsher punishments, the instructions violated paragraph 76(a)(4) of the Manual for Courts-Martial, United States, 1951, which provides that: ". . . Courts will . . . exercise their own discretion, and will not adjudge sentences known to be excessive in reliance upon the mitigating action of the convening or higher authority."

The instruction in this case is easily distinguishable and therefore compels a different result. Instead of advising the court members to consider the ssibility of parole in arriving at a sentence, the military judge expressly stated that they should not "be concerned about [its] impact." Any ambiguity as to the meaning of this language is readily dispelled by examining it in the context in which it was spoken. The fact that the trial defense counsel neither objected to the language nor

requested supplementary *voir dire* is also evidence of its clarity and harmlessness. "Normally, failure to make a timely objection where harmful affects [sic] can be ameliorated by prompt instructions, raises the doctrine of waiver." *United States v. Kiddo*, 16 M.J. 775, 776 (A.C.M.R.1983), *pet. denied* 18 M.J. 5 (C.M.A.1984). Our decision need not rest on that ground, however, since we are satisfied that the judge's instruction was not improper. *See Kiddo; United States v. Cain*, 5 M.J. 844, 848–49 (A.C.M.R.1978).

III. EFFECTIVENESS OF COUNSEL

Finally, we disagree with appellant's contention that he was denied effective assistance of counsel at trial. We recently enumerated the criteria for resolving issues of this kind in *United States v. Bowie*, 17 M.J. 821, 823–24 (A.C.M.R.1984):

> To prevail on a claim on ineffective assistance of counsel, an appellant must first prove that his attorney failed to perform with the degree of skill and diligence with which a competent attorney would perform under similar circumstances. Secondly, the appellant must establish that he was materially prejudiced in the defense of his case by his counsel's incompetence. (Citations omitted.)

Since our decision in *Bowie*, the Supreme Court held in *Strickland v. Washington* ___ U.S. ___, ___, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 680 (1984), that before a conviction will be reversed on the grounds of ineffective assistance of counsel, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Appellant argues that his attorney was ineffective in that he did not adequately prepare for either the merits or the sentencing portion of the trial. It appears from the record, however, that appellant's dissatisfaction with his attorney was misplaced. It is more likely that he was unhappy about the strength of the case against him, something over which his attorney had no control. *See United States v. Hancock*, 49

C.M.R. 830, 831 (A.C.M.R. 1975); *United States v. Zuis*, 49 C.M.R. 150, 154 (A.C.M.R.1974). First of all, appellant had admitted to a police investigator that he was the perpetrator of several of the violent crimes for which he stood trial. Extrinsic evidence corroborated that confession. Second, in a psychiatric evaluation, he had been diagnosed as being afflicted with a type of personality disorder that rarely responds to treatment. Third, he could only provide his attorney with names of character witnesses whose testimony was unlikely to help him during the extenuation and mitigation portion of the trial. The affidavits appellant submits in support of his contention do not show that defense counsel performed his duties with a lack of skill or diligence and there is absolutely no evidence that appellant's counsel committed errors so egregious as to cause his client to be unfairly convicted. Since appellant had not shown that his attorney performed incompetently, we can not find that he was denied effective assistance of counsel at trial. *See United States v. Bigger*, 2 U.S.C.M.A. 297, 301, 8 C.M.R. 97, 101 (1953).

As a final matter, we find the sentence to confinement for life wholly appropriate in this case. We reject appellant's assertion that his punishment is excessive because his victims did not suffer permanent physical injury from the rapes. In just one month, in a detached and calculated manner, appellant kidnapped, brutalized and violently raped or sodomized two different women. The Fort Lewis military community, "through the voice of the court members, has expressed its 'moral outrage' at appellant's crimes." *United States v. Hutchison*, 15 M.J. 1056, 1068 (N.M.C.M.R.1983). We agree with their sentence. Appellant's reprehensible conduct can not be tolerated in a civilized society.

The findings of guilty and the sentence are affirmed.

Senior Judge McKAY and Judge PAULEY concur.

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No. 85-2120

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In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD R. WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's incriminating statements were voluntary.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 22 M.J. 76. The opinion of the Army Court of Military Review (Pet. App. 7a-12a) is reported at 18 M.J. 823.[1]

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on April 28, 1986. The petition for a writ of certiorari was filed on June 25,

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[1] The appendix to the petition erroneously captions Appendix B as the opinion of the Court of Military Appeals, rather than as the opinion of the Army Court of Military Review.

1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried on December 13, 1982, by a general court-martial at Fort Lewis, Washington. Petitioner was convicted on two counts of rape and one count of forcible sodomy, in violation of Articles 120 and 125, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 and 925. He was sentenced to life imprisonment, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank. The convening authority, the Commanding General of the Ninth Infantry Division at Fort Lewis, reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (Supp. III) 860, and approved the findings and sentence.[2] The Army Court of Military Review affirmed the findings and sentence (Pet. App. 7a-12a). The Court of Military Appeals then affirmed the decision of the Court of Military Review (Pet. App. 1a-6a).

1. The evidence adduced at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the Court of Military Review (Pet. App. 8a). Briefly, it showed that at approximately 11:30 p.m. on August 7, 1982, petitioner abducted Teri Collins in her car, while she was stopped at a traffic light in Tacoma, Washington (Tr. 134-137). For the next four hours, while petitioner drove around Tacoma and Fort Lewis, Washington, petitioner threatened

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[2] The Commandant of the United States Disciplinary Barracks at Fort Leavenworth, Kansas, subsequently suspended a portion of petitioner's sentence, allowing him to earn $257.00 per month as long as petitioner continued to satisfy certain conditions regarding his conduct.

and berated Collins, forced her to undress and lie on the floor of her car, locked her in the trunk of her car, demanded money, and raped her (Tr. 116, 133-157, 175-184; GXs 24-30, 32-36, 38-40).[3] At about 3:00 a.m. on September 9, 1982, petitioner followed a similar modus operandi to abduct, rape, and sodomize Grace Ngirmeker (Tr. 72-79, 84-86). Petitioner abducted Ngirmeker in her own car as she was preparing to drive home from a Tacoma bus station, where she worked (*e.g.*, Tr. 71-101, 105-133, 215-218; GXs 1-11, 16-18).[4] Ngirmeker's ordeal lasted for about two and one-half hours, during which time petitioner drove around Tacoma and Fort Lewis.

a. On September 15, 1982, petitioner was identified as the principal suspect in the offenses committed against Grace Ngirmeker (Tr. 106). That evening, military authorities took petitioner into custody for questioning (Tr. 24). Agent Herring of the Army Criminal Investigation Command informed petitioner that he was suspected of kidnapping and rape, and

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[3] The evidence at trial indicated that petitioner raped Collins twice in the early morning hours of August 8, 1982: once in her car beside a road in the Tacoma area, and again on the grounds of Fort Lewis (Tr. 138-140, 147-148). Petitioner was initially charged with two counts of raping Teri Collins (R. 8). The first alleged rape occurred off-post, however, and it was therefore dismissed for lack of subject-matter jurisdiction (Tr. 38-39).

[4] The evidence at trial indicated that petitioner raped Ngirmeker near a Tacoma shopping mall (Tr. 76-79) and then drove onto Fort Lewis (Tr. 83), where he again raped Ngirmeker and forced her to commit sodomy (Tr. 84-86). While petitioner was charged with two counts of raping Ngirmeker (Tr. 7), the first alleged rape occurred off-post and was dismissed for lack of subject-matter jurisdiction (Tr. 38-39).

he advised petitioner of his *Miranda* and statutory rights (Pet. App. 2a, 8a; Tr. 24-28, 107; GX 1).[5] Petitioner acknowledged that he understood Agent Herring's warnings, and he then read and initialed the military form used by Agent Herring (Tr. 27-28, 34; GX 1). Petitioner agreed to waive his rights and to answer questions, and he then waived his rights in writing (Pet. App. 2a, 8a; Tr. 25, 27-28; GX 1). Detective Correll of the Tacoma Police Department then also advised petitioner of his *Miranda* rights (Pet. App. 2a, 8a; Tr. 27-29; GX 2). Petitioner reaffirmed that he understood his rights, and he signed a civilian form acknowledging the receipt of his *Miranda* warnings (Tr. 29; GX 2). Petitioner once again reiterated his desire to waive his rights and to answer questions (*ibid.*).

Detective Correll and Agent Herring questioned petitioner for about an hour concerning the Ngirmeker offenses (Tr. 30-31, 108). During that time, petitioner denied any involvement in those crimes (Tr. 30, 108). Initially, petitioner denied that he had ever been to the bus station in Tacoma where Grace Ngirmeker worked and from which she was abducted (Tr. 30). Petitioner subsequently admitted that he had been at the bus station, but he equivocated about his reasons for being there (*ibid.*).

After an hour of questioning, Detective Correll left the interview room to conduct a photographic display with Grace Ngirmeker, during which Ngirmeker identified petitioner (Tr. 31, 94-95, 108, 129-131). Approximately 15 minutes later, Agent Herring "appealed to [petitioner's] conscience" and told petitioner that he did not believe petitioner's story (Tr.

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[5] See *Miranda* v. *Arizona*, 384 U.S. 436 (1966); Art. 31(b), UCMJ, 10 U.S.C. 831(b).

31). On his own initiative, petitioner then stated that he had been praying to God about his problem (Tr. 31, 123). Understanding "his problem" to mean petitioner's crimes, Agent Herring told petitioner that he, petitioner, and God knew that petitioner had a problem (Tr. 31, 123-124). Petitioner reiterated that he had been praying to God for strength (Tr. 32, 124). Agent Herring then asked petitioner if he would be willing to pray to God for the strength to "go ahead and get this off [his] chest and start living [his] life and turning [his] life around" (Tr. 32; see also Tr. 124). While Agent Herring and petitioner were kneeling, petitioner, in a prayer lasting about 30 seconds, said that he "didn't mean * * * to attack those women" (Tr. 32, 125). Petitioner and Agent Herring then retook their seats, and petitioner stated: "You're right. What you said was true. I did do it" (Tr. 32; see also Tr. 124).

Petitioner twice gave his account of the Ngirmeker offenses, and he drew a sketch to illustrate where he was during his initial encounter with Ngirmeker at the Tacoma bus station (Tr. 33-33a, 114, 124; GX 4). At about 10:15 p.m., Agent Herring prepared a typed statement incorporating petitioner's account of the Ngirmeker kidnapping (Tr. 33a; GX 3). After reading the typed statement, petitioner signed an affidavit summarizing its contents (Tr. 33a, 108-113, 124-125; GX 3).

b. Prior to trial, petitioner moved to suppress his statement on two grounds: (1) the statement was unlawfully induced by a CID agent's promise of help from a psychiatrist, and (2) petitioner had not been made aware that he could terminate the interview at any time (Pet. App. 3a; Tr. 17-18; AX I). After an evidentiary hearing, the trial judge denied his

motion and issued an oral ruling containing findings of fact (Tr. 39-41). The trial court ruled that petitioner's statement was "given * * * freely, voluntarily, and without any unlawful inducement or coercion" (Tr. 41). Regarding petitioner's specific complaints, the court found that there had been no mention of a psychiatrist until after petitioner had made his statement,[6] that petitioner had been advised by both agents of his right to terminate the interview at any time, and that petitioner understood that right (Tr. 40; Pet. App. 3a). The trial court also found that the circumstances surrounding petitioner's prayer did not constitute unlawful coercion or an unlawful inducement, but consisted only of an appeal to petitioner's conscience (Tr. 40-41).

2. On appeal to the Court of Military Review, petitioner argued for the first time that "Agent Herring's appeal to [his] religious beliefs was psychologically coercive in view of his youth, limited intelligence, mental disorder (schizotypal personality) and his 'Judeo-Christian' belief in 'the cleansing power of confession'" (Pet. App. 4a). The Court of Military Review independently reviewed the evidence relating to petitioner's statement[7] and concluded that petitioner's statement was voluntary (*id.* at 9a). The Court of Military Appeals also concluded that, in light of the totality of the circumstances, petitioner's statement was voluntary (*id.* at 4a-6a).

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[6] Agent Herring testified that, after petitioner had given his statement, petitioner asked him if he could recommend a psychiatrist (Tr. 33).

[7] Art. 66(c), UCMJ, 10 U.S.C. 866(c), authorizes a court of military review to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

ARGUMENT

Petitioner contends (Pet. 4-7) that his statements were involuntary because the interviewing agent's appeal to his religious convictions, operating in conjunction with petitioner's personality disorder, unfairly overbore his will.

Determining whether a suspect's statements are voluntary requires a court to consider the totality of the circumstances. See, *e.g.*, *Miller* v. *Fenton*, No. 84-5786 (Dec. 3, 1985), slip op. 8; *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985), slip op. 19; *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). In this case, the military courts considered all the facts surrounding petitioner's statements, including those recited in the petition, and determined that his statements were voluntarily given and that the waivers of his constitutional and statutory rights were valid (Pet. App. 2a-5a, 8a-9a).[5] Petitioner does not argue that the lower courts applied the wrong legal standard; rather, his claim is that the lower courts were wrong in concluding that his statements were voluntary. That fact-bound claim does not warrant review by this Court.

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[5] The trial court did not consider the fact that appellant suffered from a personality disorder (Tr. 19-36, 39-41), because no evidence regarding his condition was proffered during the evidentiary hearing on petitioner's motion to suppress (*ibid.*). Rather, petitioner offered the testimony of a psychiatrist concerning his personality disorder as a possible mitigating factor during the sentencing portion of his court-martial (Tr. 253-263). The Court of Military Appeals, however, specifically considered petitioner's psychiatric condition and concluded that it did not render his confession involuntary, either "by itself [or] with other factors in this case" (Pet. App. 5a n.4).

Petitioner argues (Pet. 4-5) that the Court of Military Appeals failed to give sufficient weight to the interviewing agent's appeal to his religious convictions. Petitioner did not raise that claim at trial, however; instead, he claimed that his statement was the product of an unlawful inducement (*i.e.*, the promise of psychiatric help), and that he did not understand his *Miranda* rights. In any event, the reviewing courts considered petitioner's claim and properly concluded that the agent's appeal to petitioner's religious beliefs did not render his statements involuntary.

Agent Herring's manner of questioning did not involve an interrogation technique that was "so offensive to a civilized system of justice that [it] must be condemned" (*Miller* v. *Fenton*, slip op. 5; see *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 19); *Frazier* v. *Cupp*, 394 U.S. at 738-739; *Culombe* v. *Connecticut*, 367 U.S. 568, 576 (1961) (opinion of Frankfurter, J.) ("[A] confession made by a person in custody is not always the result of an overborne will. The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation.").[9] Petitioner initiated the subject of his religious beliefs in a manner indicating an expression of remorse. The interviewing agent thereafter simply followed up on petitioner's comments. The agent's conduct in doing so fell far short of being "violative of canons fundamental to the 'traditions and conscience of our people' " (*Moran* v. *Burbine*, slip op. 18 (cita-

[9] The trial court, the Court of Military Review, and the Court of Military Appeals characterized Agent Herring's appeal to petitioner's religious convictions as nothing more than an appeal to petitioner's conscience (Tr. 41; Pet. App. 5a, 9a).

tion omitted)). In fact, in his testimony in support of his suppression motion, petitioner did not even mention the agent's appeal to his religious convictions (Tr. 19-23; see Pet. App. 5a). Rather, petitioner claimed the reason he made the incriminating statements was because the agent promised him the assistance of a psychiatrist if he confessed (Tr. 21-22; Pet. App. 5a).[10]

Beyond that, the interviewing agents meticulously advised petitioner of his constitutional and statutory rights. As this Court has observed, "[t]he fact that a suspect chooses to speak after being informed of his rights is * * * highly probative" on the issue of voluntariness (*Oregon* v. *Elstad*, slip op. 19). See also *Frazier* v. *Cupp*, 394 U.S. at 739; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 249 (1973). Petitioner waived his rights and consented to answer questions before the topic of religion was mentioned (Pet. App. 5a). In addition, the circumstances of the agent's questioning were not oppressive. Petitioner was provided with water (Tr. 33a-34, 124) and was allowed to use the latrine (*ibid.*). He never requested that the interview be terminated (Tr. 33a-34), and he never asked to speak with a lawyer (*ibid.*). He made no complaints about his physical condition (Tr. 34); he was not questioned for an unduly long period of time (Tr. 24, 21, 33a); and he appeared alert and coherent throughout (Tr. 23, 36, 123).[11] Under all these cir-

[10] The trial judge rejected this testimony as a matter of fact (Tr. 40), and, in any event, petitioner's own testimony indicates the agent's appeal to petitioner's conscience had no appreciable impact on petitioner's decision to speak.

[11] Compare, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978) (statements were the product of the "virtually continuous questioning of a seriously and painfully wounded man

cumstances, the military courts properly concluded that petitioner's will was not overborne by the agent's appeal to his religious convictions.

Petitioner also relies (Pet. 4-6) on the testimony of a defense psychiatrist who stated that in his view petitioner suffered from a schizotypal personality disorder (Tr. 255-257, 259-260, 262, 267-268; DX A).[12] That testimony, however, does not aid petitioner. First, the psychiatrist did not testify at the suppression hearing or the trial; he testified at the sentencing hearing. Because petitioner chose not to present the psychiatrist's testimony until sentencing, he cannot fault the trial judge for failing to consider that evidence in connection with the suppression motion. In any event, the psychiatrist did not testify that petitioner lacked the capacity to give a voluntary statement (see Tr. 253-270). Although the defense psychiatrist testified that petitioner suffered from a

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on the edge of consciousness"); *Davis* v. *North Carolina*, 384 U.S. 737, 741-747 (1966) (an impoverished, mentally deficient suspect held incommunicado for 16 days, given barely adequate nourishment, interrogated intermittently each day, and not effectively advised of his constitutional rights); *Blackburn* v. *Alabama*, 361 U.S. 199, 200, 204, 207-208 (1960) (compelling evidence that suspect was insane when he confessed after eight to nine hours of sustained interrogation in a tiny room, which was at times filled with police officers); *Fikes* v. *Alabama*, 352 U.S. 191, 193-197 (1957) (suspect with a third grade education and suffering from schizophrenia held incommunicado in jail for a week, questioned several hours at a time over the course of the five days preceding his first confession, and deprived of the opportunity to see counsel); see generally *Schneckloth*, 412 U.S. at 226.

[12] The defense psychiatrist based his diagnosis mainly on what petitioner told him during two sessions totalling about two hours (Tr. 263-267).

schizotypal personality disorder,[13] the psychiatrist also testified that petitioner was not schizophrenic or psychotic (Tr. 260, 268). Moreover, the defense psychiatrist concluded that petitioner was sane at the time of his crimes and that petitioner possessed the mental capacity to understand the proceedings against him and to cooperate intelligently in his defense (Tr. 263; DX A, at 2).[14] Petitioner's mental condition placed him in a far different position from the defendant in *Fikes* v. *Alabama*, 352 U.S. 191, 193 (1957) ("schizophrenic and highly suggestible") or in *People* v. *Connelly*, 702 P.2d 722 (Colo. 1985), cert. granted *sub nom. Colorado* v. *Connelly*, No. 85-660 (Jan. 13, 1986) (psychotic whose mental disease compelled him to confess), and petitioner's situation cannot be equated with the circumstances in those cases.[15] Accordingly, the lower courts' rulings

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[13] According to the defense psychiatrist, petitioner displayed signs of social isolation, a failure to establish adequate rapport when communicating, vague speech patterns, hypersensitivity to rejection by women, and magical thinking, as reflected by his belief that his former girfriend had placed a curse on him (Tr. 256, 257).

[14] Petitioner also suggests (Pet. 5-6) that his intelligence was low. In fact, in his pre-enlistment tests petitioner exceeded the minimum score in all ten aptitude areas (GX 52, Item 8 of Form 2-1). Petitioner was 22 years old, he was literate, he was a high school graduate, and he had served on active duty in the Army for more than two years (Tr. 22-23; GX 52). As the Court of Military Appeals concluded (Pet. App. 5a), the evidence demonstrated no defect in petitioner's maturity or intelligence.

[15] There is no need to hold this case pending the Court's decision in *Connelly*. In *Connelly*, there was undisputed evidence that the accused suffered from a severe mental disease;

that petitioner's statements were voluntary are correct and do not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the trial court found that the defendant was psychotic and that his psychosis compelled him to confess. 702 P.2d at 725. By contrast, in this case there was undisputed evidence that petitioner was not psychotic, and there was no evidence that his statements were the product of his personality disorder. Accordingly, the result in this case would not be affected even if the Court should affirm the judgment in *Connelly*.

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